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Supreme Court of the United States

OCTOBER TERM, 1943

No. 434

MORRIS U. SCHAPPES,

Petitioner,

against

PEOPLE OF THE STATE OF NEW YORK.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF GENERAL SESSIONS OF THE COUNTY OF NEW YORK AND BRIEF IN SUPPORT THEREOF

JOSEPH R. BRODSKY,
Attorney for Petitioner.

JOSEPH R. BRODSKY,
DAVID M. FREEDMAN,
of Counsel.

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Supreme Court of the United States

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No.

MORRIS U. SCHAPPES,
Petitioner,
against

PEOPLE OF THE STATE OF NEW YORK.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF GENERAL SESSIONS OF THE COUNTY OF NEW YORK

To the Supreme Court of the United States:

Your petitioner, Morris U. Schappes, respectfully alleges:

A

Summary Statement of the Matter Involved

In March, 1940, the New York State Legislature created a Joint Legislative Committee to investigate specified matters relating to the public educational system of the State (R. 163; Peo. Exs. 1, 2, R. 1666).* Included in the resolution was a provision to investigate "the extent to which, if any, subversive activities may have been permitted to be carried on in the schools and colleges of such educational system." The Committee became generally known as the Rapp-Coudert Committee.

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* All references to the record refer to page numbers.

Under color of the resolution the Committee sought to ascertain the identity of members of the faculty and staff of the College of the City of New York, a public educational institution, who were members of the Communist Party. Petitioner was called as a witness before the Committee. He had been a member of its teaching staff for thirteen years (R. 1246). He testified at length at a private hearing and subsequently repeated his testimony at a public hearing (R. 1256, 1257). He testified, among other things, that he had been a member of the Communist Party for several years prior to 1939, when he resigned because of pressure of professional activities (R. 193, 212-213).

Petitioner testified at the public hearing on March 6, 1941 (R. 172). On March 18, 1941, he was indicted in the Court of General Sessions of the County of New York for the crime of perjury, a felony, because of alleged false testimony given at that hearing (R. 3-14). The indictment was drawn in four counts, each one relating to the answer given by petitioner to a specific question put to him at that hearing. The statements petitioner made, which are alleged to have been false, are as follows:

Count 1. That up to about February, 1938, there were only four members in the Communist Party unit at City College and that from then until about December, 1939, he was the only member of the unit; whereas there were approximately fifty members of said unit (R. 3-5).

Count 2. That he and two named members of that unit were the editors of a publication known as "Teacher Worker", published under the auspices of the unit; whereas approximately ten persons had been engaged in publishing and editing the periodical and petitioner and the other two named persons had never been its editors (R. 5-7).

Count 3. That he knew no Communist Party member who was a member of the Teachers Union or College Teachers Union, while he was a member of the party, other than himself; whereas approximately fifty other Communist Party members were members of the said unions while he was such a party member (R. 7-8).

Count 4. That there was no Communist Party fraction in the Teachers or College Teachers Union; whereas there was a Communist Party fraction in each union, consisting of those members of said unions who were members of the Communist Party (R. 9-10).

To prove that the answers made by the petitioner were false the prosecution offered the testimony of three witnesses, William M. Canning, Annette Sherman and Oscar Zeichner, who claimed to have been members of the City College unit of the Communist Party at some time during which petitioner had been a member (R. 288, 715, 793). Petitioner denied that they had been members of the Communist Party unit of which he was a member. All three witnesses had likewise testified at private and then at public hearings of the Rapp-Coudert Committee. *At the trial, disclosure was made by each of the three witnesses that when first examined at the private hearing each of them had denied membership in the Communist Party* (R. 369, 735, 802). Nevertheless each one had been examined at some length at such private hearing after such denial.

Since all the material testimony of the three witnesses was predicated upon their testimony that they had been members of the Communist Party, the revelation that they had previously sworn to the opposite effect raised sharply the question of their credibility—particularly as that supported petitioner's claim that they had not been members

of the party.[1] Petitioner therefore sought to exercise his undoubted right to cross-examine the witnesses as to their contradictory statements by subpoenaing the Legislative Committee to produce the minutes of the private hearings at which such contradictory testimony had been given (Deft.'s Ex. F, R. 1669; see appendix annexed hereto; R. 435 et seq.). The prosecuting attorney recognized petitioner's right to confront the witnesses with their prior inconsistent statements and offered no objection to the minutes of the private hearing being made available to the Court or petitioner (R. 435, 442).

The Legislative Committee, however, declined to honor the subpoena and refused to produce the minutes. An attorney for the Committee appeared before the Court and explained its position as follows:

> "Your Honor, the position of the Legislative Committee is that it will respectfully decline to produce, in response to the subpoena, the minutes of the private hearings of Mr. Canning and the other people referred to in the subpoena.
>
> "I would like to make it clear, however, that the Committee's position is not predicated on the private testimony of the three witnesses mentioned; but the Committee's position is that these private records, namely, the private hearing record and other confidential data received by the Committee, cannot be compelled to be produced by the subpoena process; that the Legislative Committee is a branch and an arm of the State Legislature; that it is independent and a co-equal body in the governmental system of this state just as much as the judicial and executive departments" (R. 437).

The Court thereupon assured the Committee's counsel that the minutes would be examined by the Court and only

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[1] The trial district attorney anticipated that their claim of membership would be challenged by petitioner. In his opening to the jury, he said: "We are going to offer a witness by the name of Canning, who, the defendant will say, is lying. He says he was a Communist, a member of the Unit at City College. * * * The defendant maintains that this man Canning is not telling the truth" (R. 152).

that portion made available to the petitioner that the Court found was material to the issues at the trial and that any secret matter contained in the minutes would be protected by the Court, and urged that the Committee reconsider the matter (R. 442). Nevertheless the Committee adhered to its original position and the minutes were not produced (R. 558). Instead the Committee counsel offered for the record a resolution of the Committee adopted some months before the trial which purported to make the minutes secret and confidential.

> "Resolved, that no testimony given by any witness at a private hearing shall be divulged to any person other than a member of the committee or an employee thereof without the consent of the witness by the Committee or any member thereof or any of the Committee's agents, employees or counsel or the reporter or stenographer making the record thereof, except that any such testimony may be used at a public hearing to impeach or refresh the recollection of the witness, and with the further exception that if such witness, after giving such testimony, shall be shown to be unavailable, at a public hearing, or, being called at a public hearing, shall contradict or deny or fail to recall such testimony given at such private hearing or the facts testified to thereat, then such testimony given at such private hearing may be read in evidence at such public hearing, but this provision shall not be deemed to impair the right of this Committee to divulge such private testimony in any proceeding to punish such witness for contempt or to enforce the giving of testimony, or in support of a complaint of perjury therein to any officer or agency charged with prosecution therefor, or in any prosecution for such perjury before any court of record or committing magistrate" (R. 558-559).

Thereafter the Court ruled that the Committee's contention was justified and denied petitioner's request that the Court order the production of the minutes (R. 626).

From the point of view of petitioner, the crucial issue in the case was the credibility of the People's witnesses.

They had testified at some length at the private hearings after denying membership in the Communist Party. Since all their testimony at the trial rested on their claim of membership, it is logical to assume that there was considerable variance between what they testified to at the private hearings and what they swore to at the trial. It was the most significant evidence available to petitioner as to the credibility of these witnesses.

There was no claim made at any time that that evidence was insignificant or immaterial or inconsequential. On the contrary, the refusal of the Committee to produce the minutes would argue the contrary. For the Committee was the instigator, the real prosecutor in the case. It desired the conviction; it supplied the evidence necessary to prosecute. The evidence in its possession that might lead to exoneration it withheld—first, on the pretext that as a part of the Legislature it could not be brought into court, and then on the strength of a resolution of its own adoption allegedly making minutes of a private hearing available to prosecute but unavailable for defense. Whatever the pretense, the purpose and effect was plain—it was to deny petitioner the opportunity of cross-examining the witnesses by means of evidence that could have discredited them.

By yielding to such action of the Legislative Committee, the ruling of the Court denied petitioner the right to cross-examine the witnesses on contradictory statements made by them on the very matters they had testified to at the trial, and the jury was deprived of essential evidence on the issue of the credibility of the prosecution's witnesses. This denial of the right to cross-examine the witnesses was a denial of the "due process" required by the Fourteenth Amendment to the United States Constitution. Petitioner therefore duly excepted to the ruling of the Court (R. 626).

Petitioner was found guilty on all of the four counts (R. 13). He was sentenced to a term of not less than one year and six months and not more than two years on the first count, and sentence was suspended on the other three counts (R. 14).

On successive appeals to the Appellate Division, First Department (1942, 264 App. Div. 917), and the Court of Appeals (1943, 291 N. Y. 575) the conviction was affirmed, Lehman, Ch. J., dissenting in a memorandum. The decision in the latter Court was a final judgment by the highest Court in the State. The case is now pending in the Court of General Sessions of the County of New York, where it was remitted by the Court of Appeals for further action.

Under the practice in New York State, no errors are assigned after trial or on appeal. The federal constitutional question was specifically raised in the memorandum of law submitted to the trial court (R. 626) [see *Bryant* v. *Zimmerman* (1928), 278 U. S. 63] and by exception taken to the Court's ruling (R. 626) and in the briefs on appeal. The remittitur of the Court of Appeals to the Court of General Sessions of the County of New York, where the case is now pending, certified that a federal constitutional question under the "due process" clause of the Fourteenth Amendment had been presented to and was necessarily considered by it (R. 1687).

The petitioner is at large on bail, pending the determination of this application for a writ of certiorari, by order of Hon. John T. Loughran, Associate Judge of the Court of Appeals.

B

Jurisdiction

1. This Court's jurisdiction rests on Section 237(b) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A., Sec. 344).

2. The judgment sought to be reviewed by this petition is a final judgment rendered by the Court of Appeals, the highest Court in the State of New York. The date of the remittitur was July 20, 1943, and this application is made within three months thereafter.

C

Question Presented

The Trial Court had before it the following situation:

A Legislative Committee instigates a criminal prosecution against the petitioner for perjury alleged to have been committed while testifying at a hearing of such Committee. The only witnesses against petitioner have previously testified before such Committee. Aside from these witnesses, no other proof is offered by the People of petitioner's guilt. By their own admission, in the course of such prior testimony, they had testified to the contrary of what they testify to at the trial on the most material matters involved in the case. If their previous testimony was true, all that they are testifying to at the trial is false, not just error. Such prior testimony is in the possession of the Legislative Committee. Put before the jury, it would have supplied the most damaging evidence available to petitioner on the issue of the credibility of the People's witnesses. Without such testimony, petitioner in effect is denied the opportunity to cross-examine them. But the Committee refuses to produce the minutes. With full realization of the effect of such refusal on petitioner's right to cross-examination and the jury's right to all the evidence available on the question of the witnesses' credibility, the Court sustains the action of the Legislative Committee.

In the light of the foregoing, the question presented is this:

> Where, in a prosecution for perjury alleged to have been committed at a hearing of a Legislative Committee, the sole evidence of falsity was the testimony of three witnesses, all of whom admitted to having testified at previous private hearings of the same Legislative Committee in a directly contradictory manner on the very matters testified to at the trial, and the Legislative Committee refuses on subpoena to sub-

mit the minutes of the testimony of such witnesses at the private hearings for the inspection of the Court, whereby petitioner was denied the opportunity of cross-examining the witnesses on such prior contradictory testimony, was the action of the Court upholding the position taken by the Committee and its failure to safeguard petitioner's right to cross-examination, a denial to petitioner of "due process" as guaranteed by the Fourteenth Amendment to the United States Constitution?

D

Reasons Relied on for Allowance of Writ

1. Petitioner was convicted on the testimony of witnesses whose credibility he assailed. Cross-examination of them on prior contradictory testimony on material matters was made impossible by the refusal of the State to produce the minutes of such prior testimony. This was a deprivation of the right of cross-examination and hence of the right of confrontation. That right would seem to be protected by the "due process" clause of the Fourteenth Amendment. However, this Court does not appear to have directly passed upon that question. The constitutional question is thus a substantial one. The problem, from a constitutional point of view, is novel.

2. The decisions of this Court in *Alford* v. *United States* (1931), 282 U. S. 687, and *District of Columbia* v. *Clawans* (1937), 300 U. S. 617, holding the denial of cross-examination to be a fatal error and denial of a fundamental right, and the implication contained in *Snyder* v. *Massachusetts* (1934), 291 U. S. 97, make it reasonably certain this Court would hold the right to cross-examination to be embraced in the meaning of "due process" as used in the Fourteenth Amendment. The action of the state courts was contrary to the settled rule in the New York courts and to the opinions of this Court as evidenced by the cited cases.

3. The Legislative Committee claimed it was not subject to process of court. The courts of the several states appear to be divided on the question of whether process may issue to co-ordinate branches of government. Reasons of state aside, principle would dictate that no agency of government may interfere with or prevent the courts from administering justice, nor should the rights of individuals to the protection of the law be nullified by arbitrary action of government. An authoritative decision of this Court on the power and duty of the courts to safeguard the rights of persons against violence by a Legislative Committee under the conditions of this case, is essential.

E

Prayer for Writ

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the Court of General Sessions of the County of New York, State of New York, commanding said court to certify and send to this Court a complete transcript of the record and all proceedings had in the Court of Appeals of the State of New York in the cause therein entitled "People of the State of New York against Morris U. Schappes"; and that said case may be reviewed and determined by this Court and the decision therein finally revised; and that your petitioner may have such other and further relief in the premises as to this honorable Court may seem appropriate.

Dated: October 15, 1943.

Respectfully submitted,

MORRIS U. SCHAPPES,
By JOSEPH R. BRODSKY,
Attorney.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinion of the Court Below

No opinions were rendered in the state courts.

The conviction was affirmed by the Appellate Division of the First Department with a memorandum reported at (1942) 264 App. Div. 917. The affirmance by the Court of Appeals, Lehman, Ch. J., dissenting in a memorandum, is reported at (1943) 291 N. Y. 575.

II

Jurisdiction

1. The statutory provision for jurisdiction in this court is Judicial Code, Sec. 237(b), (28 U. S. C. A. Sec. 344), as amended by the Act of February 13, 1925.

2. The remittitur of the Court of Appeals was dated July 20, 1943, and the petition for writ of certiorari has been filed within 3 months from said date (28 U. S. C. A. Sec. 350).

3. The remittitur of the Court of Appeals certifies that a federal constitutional question involving the "due process" clause of the Fourteenth Amendment was raised before and necessarily considered by the court.

III

Facts of the Case

Petitioner was indicted (R. 3-14) and convicted in the Court of General Sessions of the County of New York,

State of New York, of the crime of perjury in the first degree (R. 13).[2]

The facts and circumstances of the case pertinent to the questions presented to this Court are set forth in the petition, and are omitted here in the interest of brevity.

IV

Argument

To convict the petitioner of the crime charged in the indictment, it was incumbent on the prosecution to prove (1) that the testimony of the petitioner was false, and (2) that it was material. On the issue of falsity, the proof consisted solely of the testimony of three witnesses which was predicated upon their claim, made at the trial, that they had been members of the Communist Party. All three admitted having denied being members of that Party in the course of prior testimony given at private hearings of the Legislative Committee. Their credibility was thus a vital issue.

On this issue, access to minutes of the private hearing was indispensable for proper cross-examination of the People's witnesses. Under the rule of law adopted by the New York courts, petitioner was entitled to the use of such minutes for cross-examination. His right thereto was conceded. The refusal of the Legislative Committee to produce the minutes and the approval of such action by the Trial Court deprived petitioner of the opportunity and right of cross-examination on this crucial issue in the case,—the credibility of the People's witnesses.

1. The right to cross-examine opposing witnesses is a fundamental right included in the concept of "due process" guaranteed by the Fourteenth Amendment to the United States Constitution.

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[2] N. Y. State Penal Law, Sec. 1620 defines the crime of perjury. Sec. 1620a provides that "A person is guilty of perjury in the first degree who commits perjury as to any material matter * * *."

2. The credibility of the prosecution's witnesses was a crucial issue. It was a proper and under the circumstances, indispensable subject of cross-examination. The action of the Legislative Committee in refusing to produce minutes of the private hearing necessarily denied petitioner the opportunity and right to cross-examine opposing witnesses on this issue and thus deprived him of his liberty without "due process".

3. The action of the Legislative Committee was not justified on any theory of "separation of powers" or "confidentiality" of the minutes.

4. The action of the Legislative Committee constituted an unwarranted interference with the judicial process. The Court was not bound to endorse it. Approval by the Court of the Committee's action denied petitioner the "due process" guaranteed by the Fourteenth Amendment.

POINT I

The right to cross-examine opposing witnesses is a fundamental right inherent in the concept of "due process" guaranteed by the Fourteenth Amendment to the United States Constitution.

The rights of a defendant under the "due process" clause of the Fourteenth Amendment have never been enumerated, but time and circumstance have broadened its meaning. In *Twining* v. *New Jersey* (1908), 211 U. S. 78, 110, this Court said: "Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction, (citing cases), and that there shall be notice and opportunity for hearing given the parties, (citing cases)." Since that time, it has held that within these rights and fundamental to it is the right to an opportunity to offer evidence (*Saunders* v. *Shaw* (1917), 244 U. S. 317); the right to counsel (*Powell* v. *Alabama* (1932), 287 U. S. 45);

the right to a trial free from mob domination (*Moore* v. *Dempsey* (1923), 261 U. S. 86). Indeed, it has been said:

> "In whatsoever proceeding, whether it affect property or liberty or life, the Fourteenth Amendment commands the observance of that standard of common fairness, the failure to observe which would offend men's sense of the decencies and proprieties of civilized life."
>
> (Dissenting opinion of Roberts, J., in *Snyder* v. *Massachusetts* (1934), 291 U. S. 97, 127.)

We assert that the right to cross-examine opposing witnesses is one of those fundamental rights embraced in the meaning of "due process".

A

Recognizing that it is subject to reasonable control by the Trial Court, the fact remains nonetheless that the right of cross-examination is a basic right of a litigant,—an essential to our conception of a fair trial.

> "For two centuries past, the policy of the Anglo-American system of Evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statement is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience."
>
> Wigmore on Evidence (3rd ed.), Sec. 1367.

To like effect, see *Alford* v. *U. S.* (1931), 282 U. S. 687, *Heard* v. *U. S.* (C. C. A. 8 Cir., 1919), 255 Fed. 829,[3] and

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[3] "A full cross-examination of a witness upon the subjects of his examination in chief is the absolute right, not the mere privilege, of the party against whom he is called, and a denial of this right is a prejudicial and fatal error" (p. 832).

Lindsey v. *U. S.* (Ct. of App., D. of C., 1942), 133 F. (2d) 368.

The fundamental character of the right of cross-examination is recognized by the Federal Constitution. The Sixth Amendment provides in part,

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial * * * ; *to be confronted with the witnesses against him* * * * "[4] (Italics supplied.)

A like provision is contained in the Constitution of the State of New York, in Article I, Sec. 6, thereof.

> "No person shall be held to answer for a capital or otherwise infamous crime * * * unless on indictment of a grand jury, and in any trial in any court whatever the party accused shall be * * * *confronted with the witnesses against him* * * * " (Italics supplied.)

Similar provisions are contained in the N. Y. State Civil Rights Law, Sec. 12, and the Code of Criminal Procedure of that State, Sec. 8.

The right of confrontation is the right of cross-examination. Thus Wigmore says:

> "There never was at common law any recognized right to an indispensable thing called confrontation *as distinguished from cross-examination.* There *was* a right to cross-examination as indispensable, and that right was involved in and secured by confrontation; it was the same right under different names * * * "
>
> Wigmore on Evidence (3rd ed.), Sec. 1397.
>
> "It is generally agreed that the process of confrontation has two purposes, a main and essential one, and a secondary and dispensable one;

[4] "It was intended to prevent the conviction of the accused upon depositions or *ex parte* affidavits, and particularly to preserve the right of the accused to test the recollection of the witness in the exercise of the right of cross-examination." *Dowdell* v. *U. S.* (1911), 221 U. S. 325, 330.

(1) the main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination* * * *." Ibid., Sec. 1395.

B

Whether the right of cross-examination as guaranteed in the provision for confrontation in the Sixth Amendment is one of those embraced in the concept of "due process" guaranteed in the Fourteenth Amendment, does not appear to have been specifically passed upon by this Court. However, in *Snyder* v. *Massachusetts* (1934), 291 U. S. 97, this Court in discussing generally the rights embraced within the "due process" clause of the Fourteenth Amendment, by Cardozo, J., said at page 106:

> "Thus, the privilege to confront one's accusers and cross-examine them face to face is assured to a defendant by the Sixth Amendment in prosecutions in the federal courts (Garner v. Washington, supra, at p. 85), and in prosecutions in the state courts is assured very often by the constitutions of the states. *For present purposes we assume that the privilege is reinforced by the Fourteenth Amendment,* though this has not been squarely held." (Italics supplied.)

This Court divided in that case on the question of whether confrontation entitled a defendant to more than the right of cross-examination,—as to that right the Court appears to have been unanimous.

The right of cross-examination was specifically held to be a part of "due process" in *Walker Mining Co.* v. *Ind. Acc. Comm.* (Dist. Ct. of Appeals, 3 Dist. 1939), 35 Cal. App. (2) 257, 262, 95 P. (2) 188, 190. The Court there said:

> "We are of the opinion the California Industrial Accident Commission exceeded its jurisdiction in submitting and determining the insurer's petition to terminate its liability without permitting it to obtain a medical examination to ascertain the present physical condition of the claimant, and to cross-examine him in that regard. In effect, that ruling amounted to a

denial of the insurer's constitutional right to due process by refusing to permit it to cross-examine a witness upon a material issue."

See also:

Alford v. *U. S.* (1931), 282 U. S. 687.[5]

POINT II

The credibility of the prosecution's witnesses was a crucial issue. It was a proper and under the circumstances, indispensable subject of cross-examination. The action of the Legislative Committee in refusing to produce minutes of the private hearing necessarily denied petitioner the opportunity and right to cross-examine opposing witnesses on this issue and thus deprived him of his liberty without "due process".

A

Petitioner was convicted on the charge of having given false material testimony at a hearing of a legislative committee. Proof of the falsity lay solely in the testimony of three witnesses. No records, no documents, no objective or impersonal evidence was produced to support the testimony of those witnesses. Their testimony was predicated on the claim, made at the trial, that they had been members of the Communist Party at City College (R. 288, 715, 793), and through such membership had become conversant with the matters regarding which petitioner was alleged to have given false testimony.

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[5] P. 692: "To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is *to deny a substantial right and withdraw one of the safeguards essential to a fair trial.*" (Italics supplied.)

Therefore, any doubt that existed as to their membership necessarily cast doubt on all their testimony which flowed from the claim of membership.

In the course of their examination, each of the three witnesses testified to having been called as a witness at a private hearing of the Legislative Committee and at such hearing having denied ever being a member of the Communist Party (R. 369, 735, 802).

The question of the credibility of these witnesses was thus raised by their own testimony in the direct examination. On a fact of controlling importance, they had admittedly testified on a previous occasion in a manner diametrically opposite to what they testified to at trial. The credibility of a witness is not generally brought into question on the examination in chief of a witness; usually it is attacked by cross-examination or adverse witnesses. Here the issue was raised by the prosecution itself. There was no evidence or even suggestion that such prior inconsistent testimony had been prompted in any way by petitioner or that he had any knowledge whatever of such previous testimony. The attempt to impeach the credibility of a witness, customary at all trials, was here made inevitable by the admissions of inconsistent statements on a most vital issue in the case.

B

Petitioner's right to cross-examine the witnesses on the issue of credibility is unquestionable.

Wharton's Criminal Evidence (11 ed.), Secs. 1291, 1340;
Alford v. *U. S.* (1931), 282 U. S. 687, 691, 692;
Dist. of Columbia v. *Clawans* (1937), 300 U. S. 617, 631, 632;
People v. *Becker* (1914), 210 N. Y. 274, 297.

The credibility of witnesses is always an important issue for the jury (Wharton's Criminal Evidence [11th ed.], Secs.

881, 1411). But in prosecutions for perjury, it has been generally recognized that the issue of credibility is of especial significance. The rule was adopted and has been almost universally followed, that no conviction in a perjury case may rest on the uncorroborated testimony of a single witness.

Hammer v. *U. S.* (1926), 271 U. S. 620, 626;
U. S. v. *Woods* (1840), 14 Peters (U. S.) 430, 438;
Cohen v. *U. S.* (C. C. A. 2 Cir. 1928), 27 F. (2d) 713, 714;
Wharton's Criminal Law (12 ed.), Sec. 1585.

It is the doctrine in New York State.

People v. *Evans* (1869), 40 N. Y. 1;
People v. *Stone* (1884), 32 Hun 41, 2 N. Y. C. Cr. 445;
People v. *Doody* (1902), 72 App. Div. 372, aff. 172 N. Y. 165.

The rule is predicated upon the sound reasoning that since the basic question in a perjury trial is the credibility of a defendant, it shall not be determined on the word of another unless that other's credibility is supported by some additional evidence.

Consequently, in the instant case, it being a prosecution for perjury, the credibility of the People's witnesses was a most material issue. In view of their admission of prior inconsistent statements, it became a crucial issue at the trial. A witness may be impeached by proof of prior inconsistent statement (Wharton's Criminal Evidence (11th ed) Sec. 1355). The inconsistent statements of the witnesses were embodied in the minutes of the hearings at which they testified. An effective cross-examination of the witnesses on these contradictions, to afford the jury an opportunity to fairly evaluate their credibility, was possible only by the production of those minutes and an opportunity

to confront them with the prior testimony.[6] They had been examined for some time at the private hearings (R. 490, 754), and we may assume that the testimony they gave there covered much of the matter regarding which they testified at the trial. Petitioner therefore requested that the minutes be produced to be used as a basis for cross-examining the witnesses, if the court found them to be material for that purpose (Deft.'s Ex. F, R. 1669, see Appendix annexed hereto, R. 435 et seq.).

C

Where evidence exists of contradictory statements of a witness, the opposing party has the right to the use of such evidence to impeach the witness (70 Corpus Juris, Witnesses, Sec. 1219; Wigmore on Evidence (3rd ed.) Secs. 1037, 2363). The rule extends to defendants in criminal cases as well.

> Wigmore on Evidence (3rd ed.), Sec. 2224;
> *People* v. *Davis* (1884), 52 Mich. 569, 18 N. W. 362;
> *State* v. *Guagliardo* (1920), 146 La. 949, 84 So. 216;
> *Riggins* v. *State* (1915), 125 Md. 165, 93 Atl. 437;
> *Centoamore* v. *State* (1920), 105 Neb. 452, 181 N. W. 182;
> *State* v. *Archer* (1927), 32 N. Mex. 319, 255 Pac. 396.

It is the rule in England (*Rex* v. *Clarke* (1930), 32 Crim. App. Rep. 58); in the Federal courts (*Heard* v. *U. S.* (C.

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[6] *People* v. *Becker* (1914), 210 N. Y. 274, at p. 297: "Of course it was proper to show on the cross-examination of this witness that he was testifying against the defendant under an agreement that in consideration of so doing he should be turned free, and if possible wring from him some admission that his testimony was influenced by this great reward, *and for the purpose of such cross-examination defendant was entitled to have the written agreement produced and to have the court so direct its officer, the district attorney. An attempt to conduct a cross-examination based upon its provisions without production of it would have been futile, and speedily would have been forbidden by the court.*" (Italics supplied.)

C. A. 8 Cir. 1919), 255 Fed. 829, *Boehm* v. *U. S.* (C. C. A. 8 Cir. 1941), 123 F. (2d) 791, 807, cert. den. (1942) 315 U. S. 800), and in New York State itself.

> "The rule has long been established that prior contradictory statements, whether made in court under oath or outside of court orally or in writing, may in proper case be introduced to impeach the credibility of a witness." *Roge, Matter of* v. *Valentine* (1939), 280 N. Y. 268, 276.

People v. *Walsh* (1933), 262 N. Y. 140;
People v. *Wargo* (1933), 149 Misc. 461; 268 N. Y. Supp. 400;
People v. *Santorelli* (1930), 228 App. Div. 705;
People v. *Schainuck* (1941), 286 N. Y. 161.

The witnesses having admitted making the prior inconsistent statements, petitioner was entitled to cross-examine them from the minutes themselves.

Heard v. *U. S.*, supra, page 832;
People v. *Becker* (1914), 210 N. Y. 274;
People v. *Schainuck*, supra, page 164.[7]

In the extended colloquy before the Court on the right of petitioner to have the minutes produced, the trial prosecutor conceded that right without hesitation (R. 435, 442).

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[7] Foot of p. 164: "Here the contradictions between his trial testimony and his story to the Fire Marshal was admitted by the witness. Was that enough? Did the defense have to rest content with that bare showing? Should not there have been an opportunity to compare, detail for detail, the conflicting versions, and to spread them before the jury? As it stands now, the jury heard the implicating testimony at full length and with full detail, but as to the exculpating testimony it heard only the conclusory statement of the witness that his earlier testimony was to the effect that he knew nothing about the fire * * *." P. 165: "We adopt the view that the right to scrutinize prior inconsistent statements cannot be cut off by the mere admission by the witness that he has been guilty of inconsistency."

D

Petitioner accordingly subpoenaed the Legislative Committee to produce the minutes (see Appendix annexed hereto). However, the Committee refused to produce them (R. 437) and the minutes were not made available to petitioner. In spite of repeated urging by the Court (R. 439, 440, 441, 442), the Committee as reported by its counsel, remained steadfast in its refusal (R. 558).

The effect of the Committee's action was to shut off the main line of inquiry by which the petitioner could have challenged the credibility of the People's witnesses. In the absence of the minutes themselves, any inquiry as to the contradictory testimony was rendered futile. *People* v. *Becker* (1914), 210 N. Y. 274, 297 (see footnote 6 of this brief).

The denial of the minutes by the Legislative Committee deprived petitioner of his right to cross-examine the witnesses and hence of the constitutional protection of due process. *Walker Mining Co.* v. *Ind. Acc. Comm.* (Dist. Ct. of Appeals, 3 Dist. 1939), 35 Cal. App. (2) 257; 95 P. (2d) 188.

> "The denial of rights given by the Fourteenth Amendment need not be by legislation." Holmes, J., in *Saunders* v. *Shaw* (1917), 244 U. S. 317, 320.

Moreover, by refusing to produce the minutes, the Legislative Committee deprived petitioner of the opportunity of presenting evidence. This has been held to be a denial of "due process".

> *Saunders* v. *Shaw,* supra;
> *Georgia Ry. & El. Co.* v. *Decatur* (1935), 295 U. S. 165;
> *Walker Mining Co.* v. *Ind. Acc. Comm.,* supra.

POINT III

The action of the Legislative Committee was not justified on any theory of "separation of powers" or "confidentiality" of the minutes.

In the state appellate courts, the district attorney justified the non-production of the minutes (1) on the basis of the doctrine of "separation of powers"; and (2) on the claim that secrecy of the minutes rendered them confidential.

(1) The doctrine of "separation of powers"

The attorney representing the Legislative Committee, who appeared at the trial in response to a subpoena for the production of the minutes served on the Committee, made the following explanation to the court (R. 437):

> "Mr. Shea: Your Honor, the position of the Legislative Committee is that it will respectfully decline to produce, in response to the subpoena, the minutes of the private hearings of Mr. Canning and the other people referred to in the subpoena.
>
> "I would like to make it clear, however, that the Committee's position is not predicated on the private testimony of the three witnesses mentioned; but the Committee's position is that these private records, namely, the private hearing record and other confidential data received by the Committee, cannot be compelled to be produced by the subpoena process; that the Legislative Committee is a branch and an arm of the State Legislature; that it is independent and a co-equal body in the governmental system of this State just as much as the judicial and executive departments."

a

The doctrine of separation of powers is wholly inapplicable. The issue in the case is not the relation between the legislature and the courts—it is the effect upon the petitioner of a particular act of the Legislative Committee, ultimately approved and acted upon by the Court.

The provision of the Sixth Amendment to the Federal Constitution that an accused shall "have compulsory process for obtaining witnesses in his favor" is not a provision defining the power of the court, it is the declaration of a safeguard assured to every accused against individuals and government alike. No similar provision is contained in the New York State constitution, but the relations which the Federal provision suggests applies equally to the right of subpoena whether it flows from statute or custom.

Petitioner was charged with perjury alleged to have been committed at a hearing of the Committee. The prosecution was at its instigation. Its refusal to produce testimony which petitioner claimed would shed light on his innocence is fraught with suspicion and is repugnant to any idea of fair play. The doctrine has therefore been invoked as an attempted justification of conduct otherwise to be condemned as unlawful, prejudicial and offensive to the sensibilities of fair-minded men.

b

However, if the doctrine is involved in the case at all, it is in precisely the opposite form to that contended by the Committee and justified by the district attorney. The argument is made that the Court in issuing a subpoena duces tecum to the Legislative Committee was interfering with its work. In truth, the shoe fits on the other foot. What is presented here is not an interference by the Court in the performance by the legislature of *its* functions under the constitution—but rather an interference by the Legislative Committee with the performance of the Court's constitutional function—the trial of cases with even handed justice under the law.[8]

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[8] "A fertile source of perversion in constitutional theory is the tyranny of labels." Cardozo, J., in *Snyder* v. *Massachusetts* (1934), 291 U. S. 97, 114.

> "When we speak of a separation of the three great departments of government, and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree. The true meaning is, that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free constitution."
>
> Story's Constitution (5th ed.) 393, cited in *Dreyer* v. *Illinois* (1902), 187 U. S. 71, 84.

The doctrine implies that one department do not encroach upon the functions of the other or interfere with or embarrass any other department in the free exercise of its functions.[9] (See 11 Am. Jur. "Constitutional Law", Sec. 185.)

It borders on absurdity to urge seriously that by requesting the production of the witnesses' testimony at the private hearings of the Committee, for the legitimate purposes of the pending trial, the Court was exercising a legislative function or remotely interfering with the legislative process. The work of the Committee could not conceivably be hampered since the matters regarding which the wit-

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[9] "The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there. James Wilson, one of the framers of the Constitution and a former justice of this court, said that the independence of each department required that its proceedings 'should be free from the remotest influence, direct or indirect, of either of the other two powers'. Andrews, The Works of James Wilson (1896), vol. 1, p. 367. And Mr. Justice Story in the first volume of his work on the Constitution, 4th ed., Sec. 530, citing No. 48 of the Federalist, said that neither of the departments in reference to each other 'ought to possess, directly or indirectly, an overruling influence in the administration of their respective powers'." *Humphrey's Executor* v. *U. S.* (1935), 295 U. S. 602, 630.

nesses had testified to at the private hearings, were the very matters on which they subsequently testified publicly and again at the instant trial.

c

Support has been claimed for the position of the Committee in such cases as *Kilbourn* v. *Thompson* (1880), 103 U. S. 168; *McGrain* v. *Daugherty* (1927), 273 U. S. 135; *Hearst* v. *Black* (Ct. of App., D. C., 1936), 87 Fed. (2) 68, and in the New York cases of *State Educational System* (*Teachers Union*) (1941), 285 N. Y. 1, and *Matter of LaGuardia* v. *Smith* (1942), 288 N. Y. 1. The cases, however, are entirely inapplicable. In all of them recourse was had to the courts to prevent the legislature from carrying out some function related to the legislative process—and this the court refused to do. This is a far cry from a request made to the Legislative Committee to permit the court to carry out the judicial process, and administer justice.

On the other hand, courts have not been hesitant to prevent the Legislature from exceeding its authority and interfering with the rights of citizens. Thus, it prevented examination of a witness by a congressional committee on private matters beyond its authority in *Kilbourn* v. *Thompson,* supra, and the exercise of the power of contempt without constitutional justification in *Marshall* v. *Gordon* (1917), 243 U. S. 521. (Compare also *Reeve* v. *Howe et al.* (D. C., E. D. Pa., 1940), 33 F. Supp. 619.)

Nor have they been hesitant to strike down legislation that attempted to invade or interfere with the judicial process that legitimately belongs to the courts alone.

In re Handley's Estate (1897), 15 Utah 212;
Davis v. *Menasha* (1867), 21 Wisc. 497;
Ratcliffe v. *Anderson* (1878), 31 Grattan (Va.) 105, 31 Am. Rep. 716;
Marpole v. *Cather's Admr.* (1883), 78 Va. 239;
Minn. ex rel. Flint v. *Flint* (1895), 61 Minn. 539;
Matter of Siblerud et al. (1921), 148 Minn. 347.

See particularly:

Matter of Dauphin Co. Grand Jury Investigation Proceedings (No. 2) (1938), 332 Pa. 342.

d

Immunity of the Committee from Process

As a corollary to the substantive argument on separation of powers, counsel for the Legislative Committee suggested that it was not subject to the subpoena process (R. 437).

> "For more than three centuries it has now been recognized as a fundamental maxim that the public has a right to every man's evidence."
>
> Wigmore on Evidence (3rd ed.), Sec. 2192.
>
> "This testimonial duty to attend and disclose all that is needed for the ascertainment of truth applies to *every form and material of evidence* whatever.
> "In particular it applies to such evidential material as exists in a person's hands in the form of *documents.*"
> Ibid., Sec. 2193.

Applying these fundamentals to the chief executive, Wigmore continues (Sec. 2370):

> "Is there any reason why this right should suffer an exception when the desired knowledge is in the possession of a person occupying at the moment the office of *Chief Executive* of a State?
> "There is no reason at all. His temporary duties as an official cannot override his permanent and fundamental duty as a citizen and as a debtor to justice. The general principle of testimonial duty to disclose knowledge needed in judicial investigations is of universal force. It does not suffer an exemption which would be irrespective of the person's knowledge and would rest wholly on the nature of the person's occupation. This duty, and the equal application to the Executive and subordinate officers, has perhaps never been doubted."

Whatever rule or logic applies to the Chief Executive undoubtedly applies with equal force to the Legislature and certainly to one of its committees.

Furthermore, distinction must be drawn between exemption from process requiring personal attendance and the duty to furnish evidence (Wigmore, ibid., Sec. 2372). Though it should be pointed out that the vice-chairman of the Committee raised no question of immunity about attending in person and being a witness at the trial in behalf of the prosecution (R. 163-170).

Whether or not obedience to the process could be enforced is no reason for the Court to yield its right to issue it.

> "It cannot be denied that to issue a subpoena to a person filling the exalted station of Chief Magistrate is a duty which would be dispensed with more cheerfully than it would be performed; but, if it be a duty, the Court can have no choice in the case. If then, as is admitted by the counsel for the United States, a subpoena may issue to the President, the accused is entitled to it of course; and, whatever difference may exist with respect to the power to compel the same obedience to the process as if it had been directed to a private citizen, there exists no difference with respect to the right to obtain it." Marshall, C. J., in Aaron Burr's Trial (1807).
>
> Cited in Wigmore on Evidence (3rd Ed.), Sec. 2371, page 740.

The courts of New York State itself have issued process to Legislative Committees and have exercised jurisdiction in applications to quash subpoenas issued by or under direction of such committees.

Peo. ex rel. Hastings v. *Hofstadter* (1932), 258 N. Y. 425;

Herlands v. *Surpless* (1914), 171 Misc. 914, aff. 258 App. Div. 275, aff. 282 N. Y. 647;

Matter of State Educational System (*Teachers Union*) (1941), 285 N. Y. 1; (involving the Legislative Committee concerned in this case);

Matter of LaGuardia v. *Smith* (1942), 288 N. Y. 1.

Similarly, process was issued to a congressional committee in *Hearst* v. *Black* (1936), 87 F. (2d) 68.

(2) The doctrine of the right of secrecy

It is claimed further that the testimony having been taken at a private hearing was confidential and the Committee had a right to keep it secret. This is urged on grounds of general legal principles and on a specific resolution of the Committee itself. Counsel for the Committee read into the record a resolution which had been adopted by the Committee providing that (R. 558-559):

> "* * * no testimony given by any witness at a private hearing shall be divulged to any person other than a member of the committee or any employee thereof without the consent of the witness by the Committee, or any member thereof or any of the Committee's agents, employees or counsel or the reporter or stenographer making the record thereof, * * *"

except for purposes of proceedings against such witness or to correct or impeach his testimony.

So far as the resolution is concerned, there is nothing in the record to show that the witnesses had refused consent to the production of the testimony. They were never asked because the Committee chose to act peremptorily and so far as appears, without consultation with the witnesses. Moreover, the prohibition of the resolution that "no testimony * * * shall be divulged to any person" can hardly be interpreted to extend to a court in the exercise of its constitutional function. Indeed, says Wigmore, "any *statute* declaring in general terms that official records are confidential should be liberally construed to have an implied exception for disclosure when needed in courts of justice" (Wigmore on Evidence (3rd ed.), Sec. 2379 (2)).

The reasons that have prompted the holding of documents of state or military secret secure against disclosure are inapplicable here. In fact, whatever motives (whether

the protection of the witness or the avoidance of publicity as to the committee's activities) induced the private hearings, their purpose could no longer be served by the withholding of the testimony. Firstly, all of the witnesses had already testified at public hearings after the private ones; they were now testifying publicly at the trial; the subject matter of their testimony on all three occasions was substantially the same. Secondly, whatever latent possibility existed that the minutes might disclose inquiry along lines other than that pursued at the trial, which the Committee would not want divulged, the Committee's counsel was assured by the court that under the rule of *People* v. *Walsh* (1933), 262 N. Y. 140, he would first examine the minutes and then make available to petitioner only such parts of the testimony as appeared to be material.

> " * * * Then, after I examine them, only to be turned over to counsel for the defendant if I find substantial contradictions between the testimony given by the witness here and the testimony as given before the Committee; that is, at its private hearings" (R. 439).
>
> "I merely say to you, I am asking Mr. Shea to take up with his Committee the question of submitting the transcript of the witness' testimony so that the Court may examine it, and then determine whether or not it should be turned over to you, as counsel for the defendant" (R. 442).

Finally, it is submitted that whether or not the minutes were entitled to the privilege of secrecy was a question for the Court to determine and not the committee.

> "So far as the privilege (of state secrecy) has legitimate scope, it raises the question how the existence of the facts which make it applicable is to be determined. * * * Who shall make this determination?
>
> "Obviously, and by analogy with other privileges, the Court * * *.
>
> "The truth cannot be escaped that a Court which abdicates its inherent function of determining the facts upon which the admissibility of evidence depends will furnish to bureaucratic officials too ample opportuni-

ties for abusing the privilege. The lawful limits of the privilege are extensible beyond any control, if its applicability is left to the determination of the very official whose interest it may be to shield a wrongdoing under the privilege. Both principle and policy demand that the determination of the privilege shall be for the Court; and this has been insisted upon by the highest judicial personages both in England and the United States."

Wigmore on Evidence (3rd ed.), Sec. 2379 and cases cited.

POINT IV

The action of the Legislative Committee constituted an unwarranted interference with the judicial process. The Court was not bound to endorse it. Approval by the Court of the Committee's action denied petitioner the "due process" guaranteed by the Fourteenth Amendment.

As discussed heretofore, petitioner was entitled to have the minutes of the prior contradictory testimony of the People's witnesses produced by the Legislative Committee. In aid of that right, the Court issued its subpoena to the Committee, directing the production of the minutes (see Appendix).

When the Committee demurred, the Court attempted to persuade it, through its counsel, to reconsider and obey the subpoena (R. 439, 440, 442). After apparent reconsideration, the Committee adhered to its refusal to produce the minutes (R. 558).

The action of the Committee was thus an interference with the judicial process (a) in that it was contemptuous of the Court, and (b) in that it deprived petitioner of the opportunity to cross-examine, a right fundamental to the judicial process. It hampered, hindered and seriously em-

barrassed the Court in the exercise of its function of trying cases, for it prevented the Court from extending to petitioner, the constitutional right of cross-examination to which he was entitled. The doctrine of separation of powers confers no such power in the Legislature to interfere with and prevent the judicial process.

> "The three departments being invested with the entire sovereignty of the people, and constituting the State government, are not so independent of each other as that those in authority in one department can ignore and treat the acts of those in authority in another department, done pursuant to the authority vested in them, as nugatory and not binding on every department of the State government."
>
> *Board of Commissioners of White County* v. *Gwin, Sheriff* (1893), 136 Ind. 562, 585.

Administration of justice must not be paralyzed by "the fetich of some implacable tenet, such as that of the division of governmental powers", Cardozo, The Nature of the Judicial Process (1928), p. 148. See also, *Wilson* v. *U. S.* (C. C. A. 3rd, 1932), 59 F. (2) 390, 392, "If what is asked is useful evidence to vindicate the innocence of the accused or lessen the risk of false testimony or is essential to the proper disposition of the case, disclosure will be compelled"; *Centoamore* v. *State* (1920), 105 Neb. 452, 455, 181 N. W. 182, 183, "The determination of the question of guilt or innocence of the accused is of so great importance that the accused should not be denied the right to produce such material testimony, available and within his reach, merely from the fact that there are reasons of public policy why the communication, which has become the very basis of the charge made against him, should not be disclosed."

The Court is not powerless to act because in a given case, its process does not produce the required evidence.[10] It is not obliged to permit injustice or an unfair trial because the non-cooperation of a coordinate branch of government prevents it from doing justice and insuring a fair trial.

Despite such effect of the Committee's behaviour, the Court ruled, over petitioner's objection, that the Committee was within its rights in refusing to produce the required minutes (R. 626). To this ruling, petitioner duly excepted (R. 626).

By approving the decision of the Committee, the Court deprived petitioner of the opportunity for cross-examination, which was a denial of "due process". The court is not bound to follow the unlawful, unwarranted and prejudicial conduct of the legislature or its committee.[11]

It has long been the law that when cross-examination is made impossible through no fault of the opposing party, the examination-in-chief must be stricken out.

> Abbott, Criminal Trial Practice (4th ed.), Sec. 312, p. 572;
>
> *People* v. *Cole* (1871), 43 N. Y. 508.

"No injustice is done to the party seeking to avail himself of the evidence to require, that, before its

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[10] Note from Wigmore on Evidence (3rd ed.), Sec. 2371, note 4: "1800 U. S. v. Cooper, Whart. St. Tr. 659, 10 Amer. St. 774,783 * * * 'the accused also desired to compel the attendance of several members of the Congress, then in session, and "asked the Court to address a letter to the Speaker of the House, requesting him to have the process served; Judge Peters thought this the proper course; Judge Chase ordered process to issue without such letter, saying that if it was necessary to compel the attendance of the members the case would be continued until the session was over" '."

[11] Compare e. g. statement of Pres. Roosevelt on Urgent Deficiency Appropriation Act, 1943, appearing in Congressional Record, Senate, Sept. 14, 1943, Vol. 89, No. 132, p. 7600: "This rider is an unwarranted encroachment upon the authority of both the executive and the judicial branches under our Constitution. It is not, in my judgment, binding upon them."

admission, its truth shall be subjected to such tests as the experience of ages has shown were necessary to render reliance thereon at all safe, and where this has been prevented without any fault of the adverse party, to exclude the evidence" (p. 513).

State v. *Bingham* (1926), 133 S. C. 491, 131 S. E. 603;

70 Corpus Juris, Witnesses, Sec. 788, p. 618.

Having established that denial to petitioner of the right to cross-examine witnesses from these minutes denied him a trial by "due process", it is immaterial whether the source of such denial was the Court or the Committee. The constitutional inhibition of the Fourteenth Amendment is directed to the state, which includes all its agencies—the courts, the executive and the legislative, alike.

"A State acts by its legislature, its executive, or its judicial authorities. * * *

"Whoever, by virtue of public position under a State government, deprives another of property, life or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State."

Ex parte Virginia (1879), 100 U. S. 339, 347.

CONCLUSION

The substantial question of "due process" involved in this application is of particular importance in that it was precipitated by action of a Legislative Committee. Great concern has been expressed of the dangers to democratic government in the growing inquisitorial character of such committees.[12] The action in the instant case was a further

[12] See, The Inquisitorial Power of Congress by Bryce L. Hamilton, Journal of Amer. Bar Assn., July 1937, Vol. 23, p. 511.

expression of disregard for traditional and constitutional safeguards for persons accused of crime or other wrongdoing.

This Court in the exercise of its supervisory power should grant a writ of certiorari to review and revise the judgment in this action now pending in the Court of General Sessions of the County of New York.

Respectfully submitted,

JOSEPH R. BRODSKY,
Attorney for Petitioner.

October 15, 1943.

APPENDIX

Subpoena Duces Tecum

COURT OF GENERAL SESSIONS OF THE
COUNTY OF NEW YORK

PART 6

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK

COUNTY OF NEW YORK ss.:

To JOINT LEGISLATIVE COMMITTEE TO INVESTIGATE EDUCATIONAL SYSTEM, by PAUL WINDELS, Counsel

YOU ARE COMMANDED to appear before the COURT OF GENERAL SESSIONS OF THE COUNTY OF NEW YORK, to be holden in and for the said County of New York at the Building for Criminal Courts in the Borough of Manhattan of The City of New York on 19th day, the June day of 1941 instant, at the hour of ten o'clock in the forenoon of the same day, as a witness in a criminal action prosecuted by THE PEOPLE OF THE STATE OF NEW YORK against MORRIS U. SCHAPPES and you are required also to bring with you the following:

Private testimony given by William Martin Canning, Annette Sherman-Gottesegen, Oscar Zeichner, & Abraham Goodhartz.

Dated at the Borough of Manhattan in the City of New York, the 18th day of June 1941.

By order of the Court,

L.S.

F. HOWARD BARRETT
Clerk of Court.

EDWARD KUNTZ
Counsel for Defendant.

PART 6TH

The Court Room is on the 4th Floor.

If this Subpoena be disobeyed, or you do not explain your absence, the Court will enforce attendance and fine you.

Bring this Subpoena with you, and give it to the officer at the Court-Room door, that your attendance may be known.

(34)

Office - Supreme Court, U. S.
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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1943

No. 434

MORRIS U. SCHAPPES,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF GENERAL SESSIONS OF THE COUNTY OF NEW YORK

RESPONDENT'S BRIEF

FRANK S. HOGAN
District Attorney
New York County

STANLEY H. FULD
Assistant District Attorney

RICHARD G. DENZER
Deputy Assistant District Attorney

Of Counsel

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THE PEOPLE OF THE STATE OF NEW YORK,

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RESPONDENT'S BRIEF

Opinion Below

The petitioner was convicted of the crime of perjury in the first degree (Penal Law, §§ 1620, 1620-a), in the Court of General Sessions of New York County, State of New York (4894-5).*

On appeal to the Appellate Division of the Supreme Court of the State of New York, First Department, that Court unanimously affirmed the judgment of conviction, with a memorandum reported in 264 App. Div. 917. On further appeal to the Court of Appeals, the judgment of conviction was affirmed, LEHMAN, Chief Judge, dissenting in a memorandum; the affirmance is reported in 291 N. Y. 575.

* References are to folios in the printed record.

Jurisdiction

The jurisdiction of this Court is invoked under section 237(b) of the Judicial Code as amended [28 U. S. C. A., § 344(b)] upon the claim that the petitioner was denied due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Question Presented

Three of the People's witnesses had previously testified before a Legislative Committee at private hearings. At the trial, they admitted that they had made statements which were at variance with their trial testimony. They were cross-examined thereon exhaustively and at length.

The question presented is whether the trial court's ruling refusing the petitioner's demand for the transcripts of that prior testimony for use on cross-examination constituted a denial of due process of law.

Statement of Case

A Joint Committee of the Legislature of the State of New York, known as the Rapp-Coudert Committee, had been set up to investigate, among other things, the extent to which "subversive activities may have been permitted to be carried on in the schools and colleges" of New York State [Peo's Exhs. 1 and 2, clause 1, subd. (i)]. The petitioner, a teacher at the College of the City of New York, called as a witness before the Committee, acknowledged that he was a member of the Communist Party.[1] In testifying as to the existence and the extent of Communist activities at City College, the petitioner committed perjury, and there followed an indictment charging him, in four separate counts, with perjury in the first degree (11-28).

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1. It was independently established that the doctrines enunciated by the Unit of the Party at City College called for action that was "subversive".

No purpose is to be served by detailing the proof establishing the guilt of the petitioner—described, we note, by the Appellate Division as "overwhelming" (264 App. Div. 917). Suffice it to observe that three of the People's witnesses, William M. Canning, Annette Sherman, and Oscar Zeichner, testifying, in effect, that there were at least 36 members of the Communist Party at City College, conclusively proved the allegations of the indictment's first count, namely, that Schappes had lied when he swore that there were only four such members prior to 1938, and only himself after that date and until December, 1939 (734-7, 3766, 3783).[2]

The charge did not, however, depend exclusively upon the testimony of the three witnesses named. Confirmation of their evidence is found both in the testimony of another City College teacher, Francis Williamson (2120, 2125),[3] and in certain published statements of Schappes himself (4170, 4183, 4195, 4199, 4237-8, 4259-60).[4]

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2. It is of the utmost significance, we believe, that *of the three persons named by the defendant, in addition to himself, two* (Wardlaw and Chaikin) *were dead, while the third* (Friedman) *was in Massachusetts and "publicly known" as a Communist* (733-7, 781, 785). Markoff, *"the only additional person"* the defendant could name "who was at any time a member of the Teachers Union and of the Communist Party" *was also dead* (779, 780-1, 785, 786).

3. Williamson left no doubt that Canning was a member of the Communist Party and that Schappes knew it. For instance, he declared that he was approached by both Schappes and Canning together and asked by both to join the College Communist Unit (2120, 2125).

4. Thus, in an issue which appeared in the summer of 1937—at a time when, according to the petitioner, the Communist Unit had only two members—Schappes had written (4195):

> "At the College, the Communist Party Unit *has increased its membership manifold* in the past few years"

and in the April 1938 issue—when, according to Schappes, he was the only member of the Unit at the College, the paper recited (4259):

> "The first two [Unit] *meetings were devoted to a discussion* of the Party's peace program."

Argument

The petitioner complains that he was unable adequately to cross-examine three of the People's witnesses because he was not permitted to inspect transcripts of testimony previously given by them at private hearings of the Joint Legislative Committee. Upon their first appearance before the Committee, each of these witnesses had claimed that he had not been a member of the Communist Party.

It it evident that they had, as each admitted upon the trial, previously lied concerning that item, and upon their second appearance before the Committee, each retracted his false statement. Indeed, thereafter and throughout the trial, all steadfastly maintained that they had, in fact, been members of the Communist unit and recounted various incidents which branded the petitioner's testimony before the same Committee as perjurious.

That the witnesses had previously made the false statements in question, though readily explainable, was, of course, a factor which the petitioner was entitled to rely upon in attacking their credibility, and this he did to the hilt—both during the summation and during the exhaustive cross-examination to which the witnesses were subjected. Virtually the only restriction upon these cross-examinations occurred when defense counsel sought to procure transcripts of the witnesses' original testimony before the Legislative Committee for the purpose of emphasizing still further the fact that they had then made the false statements to which reference has been made. This limitation —the point complained of here—was, we note, a result not of any objection on the part of the prosecution (1307)—which, in any event, had neither possession nor control of the testimony—but of a representative of the Committee itself (1309-11, 1672).

After consideration, the court sustained the Committee's objection and refused to compel production of the minutes.

The petitioner seeks to magnify the incident and to distort it into an "expression of disregard for traditional and constitutional safeguards" (Petitioner's Brief, p. 35), by invoking the "due process of law" clause of the Constitution.

The trial court's ruling, we submit, was in accord with the law of New York State; but even if regarded as incorrect, the error would hardly constitute a denial of due process within the meaning of the Federal Constitution—"a denial of fundamental fairness, shocking to the universal sense of justice." [*Betts* v. *Brady* (1942) 316 U. S. 455, 462.] [5]

I

The trial court's refusal to compel production of the committee minutes was correct as a matter of law [In answer to Petitioner's Brief, Point III, pp. 23-31].

The Court of Appeals of New York State has recognized that where a trial witness has made a prior inconsistent statement, the opposing party is entitled to use that statement for cross-examination purposes if the trial judge after inspecting the document concludes that its disclosure is proper. [See *People* v. *Walsh* (1933) 262 N. Y. 140.] More specifically, production and disclosure of the statement may be required only (1) if it "is in court" or "in the possession or control of the prosecution" (262 N. Y., at pp. 149-150); (2) if it "reveals contradictory matter" (262 N. Y., at p. 149); and (3) if, "upon inspection," the court finds that publication "would [not] be prejudicial to the public interest" (262 N. Y., at p. 150).

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5. Indeed, this Court denied certiorari in *Bochm* v. *United States* (1942) 315 U. S. 800, a case, very similar to the present, where the precise argument here relied upon was advanced. (See Petitioner's Brief in *Bochm* case, pp. 28-35.)

In this case, the statements were not "in court" or "in the possession or control of the prosecution"; they were "in the possession and control" of an independent legislative organ. In addition, since the material contained in the statements, was of a confidential nature, its "publication" would have been "prejudicial to the public interest"; hence, the statements were "privileged" within the contemplation of the *Walsh* case (262 N. Y., at p. 150). Thus, even had the trial judge inspected them, he would have been prompted by every consideration of fairness and law to withhold them from defense counsel.

We briefly treat these matters.

A. The doctrine of the separation of powers fully warranted the non-production of the minutes taken at the private hearings [In answer to Petitioner's Brief, pp. 23-29]

Although, as we have observed, the assistant district attorney interposed no objection to the defendant's request for the private testimony in question (1308), a representative of the Committee opposed disclosure upon the ground that such testimony represented "private records * * * and confidential data" and had been given to, and was then in the possession of, an "independent and a co-equal body," to wit, the Legislature (1309-10).

In sustaining the Committee's position, the trial judge followed settled principles defining the rights and privileges of legislative investigating bodies. [See *Hearst* v. *Black* (Ct. App. D. C. 1936) 87 Fed. (2d) 68; *State Educational System* (*Teachers Union*) (1941) 285 N. Y. 1; see, also, *Matter of La Guardia* v. *Smith* (1942) 288 N. Y. 1, 5-7.]

These cases reveal that, when the courts uphold the power and independence of a legislative committee, they generally rest their decisions upon the principle of the separation of powers—a principle which this Court has recognized as "inherent in the American constitutional

system." [See *Springer* v. *Philippine Islands* (1927) 277 U. S. 189, 201; see, also, *Matter of La Guardia* v. *Smith, supra,* 288 N. Y. 1, 10, *per* LEHMAN, Ch. J., in dissenting opinion; *Kilbourn* v. *Thompson* (1880) 103 U. S. 168, 190; *McGrain* v. *Daugherty* (1927) 273 U. S. 135.]

The doctrine of separation applies, of course, whether the immunity from judicial interference or compulsion be sought by the legislative branch of the government or by the executive. This principle is no sterile and doctrinaire formulation. Rather, it rests upon the principle that "Courts are not the only agency of government that must be assumed to have capacity to govern." [*Per* STONE, J., dissenting, in *United States* v. *Butler* (1936) 297 U. S. 1, 87.]

B. In any event, the elements of confidentiality and secrecy render privileged the statements requested by the defendant [In answer to Petitioner's Brief, pp. 29-31]

The foregoing authorities establish that the trial court had no power to compel the production of the Committee's minutes under *any* circumstances, but we need not go so far to sustain the action taken in the present case. Under the circumstances presented in this record, the court was bound to respect the Committee's judgment, resting as that did on its own settled policy of secrecy—a policy which, under the rule of *People* v. *Walsh, supra,* 262 N. Y. 140, 150, was patently consonant with the public interest.

1. The importance of confidentiality in the Committee's work

The Resolution of March 29, 1940, which created the Rapp-Coudert Committee, empowered it to investigate and study the entire educational system of the state, with a view to suggesting improvements in the procedure and methods employed in the allocation of state moneys for the maintenance of this system. [See *State Educational System* (*Teachers Union*), *supra,* 285 N. Y. 1, 6.] That

the state appropriated large sums of money for this Committee is eloquent indication of the importance attached to its work.[6]

The investigation might well have been seriously hampered if the testimony requested by the defendant had been disclosed. The Committee had not yet completed its work; hearings were still being held; and prospective witnesses, apprised that their confidences would not be held inviolate, might well have been afraid to give testimony implicating their colleagues in Communist activities at City College.

Thus, the record itself is persuasive that it was of the utmost public importance that the court should recognize the Committee's power to shield the witnesses who had aided, or might later be called upon to aid, in its work.

Indeed, the Committee, undoubtedly concerned over these considerations, adopted a Resolution, on January 14, 1942, **some months prior to this trial,** which expressly prohibited divulgence of testimony given "at a private hearing," without the witness' consent, except for use in correcting or impeaching subsequent testimony by the same witness at other hearings of the Committee, or to facilitate the bringing of a contempt proceeding or perjury prosecution against that very witness (1674-5). The formulation of such a Resolution cogently indicates the Committee's belief that there was a need for confidentiality if a major investigation, then being conducted on behalf of the people of New York State, were to be successful.

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6. For the year 1941, the state appropriated the sum of $2,232,218 for salaries alone in connection with public education (Laws 1941, ch. 100, p. 310); it also set aside a further sum of $100,000 for the Committee's exclusive use (Laws 1941, ch. 945, p. 2200).

2. The sound rule which clothes the proceedings of certain investigative bodies, such as the grand jury, with secrecy should apply here

The propriety of the court's ruling finds support in decisions of the Massachusetts court involving grand jury minutes: it has been held that even though it appeared that a witness had testified inconsistently before the grand jury, the cross-examiner is not entitled to have the witness' testimony before that body produced in court. [See *Comm.* v. *Gettigan* (1925) 252 Mass. 450, 148 N. E. 113; *Comm.* v. *Goldberg* (1912) 212 Mass. 88, 98 N. E. 692.]

Other cases might be cited to illustrate the need to protect from the scrutiny of the individual or the private litigant as well as a need for secrecy—in the interests of the public—of many different types of records; we list a few of them: diplomatic correspondence and communications relating to the apprehension and prosecution of criminals; [*Marbury* v. *Madison, supra,* 5 U. S. (1 Cranch) 137, 144; *Matter of Egan* (1912) 205 N. Y. 147; *People ex rel. Stenstrom* v. *Harnett* (3rd Dept. 1928) 224 App. Div. 127, aff'd 249 N. Y. 606; *Gray* v. *Pentland* (1815) 2 S. & R. (Pa.) 23; *Morris* v. *Creel* (1816) 2 Va. Cas. 49, 50]; selective service board records [*Harris* v. *Walsh* (Ct. of App. D. C. 1922) 277 Fed. 569]; post office records [*Brower* v. *Hinds* (C. C. A. 2nd Cir. 1934) 69 Fed. (2d) 52]; internal revenue records [*In re Huttman* (D. C. Kansas 1895) 70 Fed. 699)]; unemployment insurance records (Labor Law, § 524); venereal disease reports (Public Health Law, §§ 25, 343-ll); druggists' records of narcotic prescriptions (Public Health Law, § 437); income tax returns (Tax Law, §§ 219-i, 384).

3. Since the disclosure of the statements requested by the defendant would have been "prejudicial to the public interest", they must be deemed privileged [*People* v. *Walsh*, 262 N. Y. 140, 150]

We recognize that, under ordinary circumstances, the production of a statement previously made by a witness testifying against the accused, at variance with his trial testimony, may be compelled. [*People* v. *Walsh, supra,* 262 N. Y. 140; *People* v. *Schainuck* (1941) 286 N. Y. 161.] We do not believe, however, that those decisions require the court to insist upon disclosure of minutes of private legislative hearings, if privileged or confidential—as they clearly are—or if such disclosure would be prejudicial to the public interest.

Indeed, in both of the above cited decisions—although the statements there in issue did not contain confidential information—the Court of Appeals recognized the possibility that the privileged character of the information sought to be used might warrant the trial court's refusal to permit its disclosure. [See *People* v. *Walsh, supra,* 262 N. Y. 140, 150; *People* v. *Schainuck, supra,* 286 N. Y. 161, 163.] Thus, in the *Walsh* case, *supra,* 262 N. Y. 140, the Court observed (p. 150):

> "It is conceivable, however, that the court upon inspection may find matter, the publication of which would be **prejudicial to the public interest. In such case the statement would be privileged.**"

In laying down this *caveat*—in a case which did not call for it upon its facts—the Court merely followed the doctrine formulated in earlier cases, cited with approval in the *Walsh* case. [See *People* v. *Davis* (1884) 52 Mich. 569; *Riggins* v. *State* (1915) 125 Md. 165, 93 Atl. 437.]

In short, where there is a clash of two principles—one for the benefit of the individual and one in the interests of the state or of the public—it seems to us that the interests of the public must be deemed paramount. [See

Beatson v. *Skene* (1860) 5 H. & N. 838, 853.] Here, the interests of the public—through one of its legislative committees—were, as we have indicated, substantial. While the question might present some difficulty if the interests of the individual—the petitioner—were also of a vital sort, such as in the turning up of conclusive evidence of his innocence, this was far from the actual situation. His interest—simply to use the statements further to labor a collateral inquiry, developed, in any event, to exhaustive lengths—seems most nebulous. Clearly, no injustice was done, no rule of law violated.

II

Regardless of the correctness of the trial court's ruling, the petitioner suffered no constitutional deprivation and, accordingly, no federal question is presented.

In any event, the petitioner may not properly assert a constitutional deprivation or a denial of due process such as would bring his case within this Court's jurisdiction unless he can establish that the error complained of "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." [See *Snyder* v. *Massachusetts* (1934) 291 U. S. 97, 105; see, also, *Betts* v. *Brady* (1942) 316 U. S. 455, 473; *Lisenba* v. *California* (1941) 314 U. S. 219, 236; *Palko* v. *Connecticut* (1937) 302 U. S. 319, 325.]

While it is patent that the trial judge's refusal to permit the petitioner the use of the Legislative Committee minutes, fell far short of any such fundamental injustice or denial of due process, the petitioner seeks a detour to constitutional deprivation through invocation and distortion of the basic rights of "confrontation" and "cross-examination" (Petitioner's Brief, pp. 14-16). We note, in passing, that, contrary to the petitioner's suggestion (Brief, p. 15), neither of these rights or privileges

is specifically guaranteed him in the Constitution; there is no provision dealing directly with cross-examination and, while the Sixth Amendment declares that "the accused shall enjoy the right * * * to be confronted with the witnesses against him," that "applies only to trials in federal courts". (*Betts* v. *Brady, supra,* 316 U. S. 455, 461.) Accordingly, if there be any constitutional deprivation in this regard, it must be of the shocking sort of injustice envisaged by the due process clause in the Fourteenth Amendment. [*Cf. Palko* v. *Connecticut, supra,* 302 U. S. 319, 322, *et seq.*]

At any rate, since the petitioner not only was "confronted with the witnesses against him" (Constitution of United States, Amendment VI), but also cross-examined them—the three in question—at considerable length, it is difficult to perceive how these principles are involved. The argument apparently is that the right to cross-examine witnesses imports a right to cross-examine upon any relevant, though collateral, subject, at any length, upon any ramification, without any curtailment by the trial judge.

Of course, no such right is guaranteed in the Constitution—either by the Sixth Amendment, by the Fourteenth, or by any other provision. The privileges of confrontation and of cross-examination are ordinarily invoked and considered where the defendant has been denied the opportunity to be present at his trial or where he has had no opportunity whatever to cross-examine and, even in that type of situation, the doctrines are subject to many exceptions. [See *Snyder* v. *Massachusetts, supra,* 291 U. S. 97; *Edwards* v. *United States* (1941) 312 U. S. 473; *Dowdell* v. *United States* (1911) 221 U. S. 325; *Walker Mining Co.* v. *Industrial Accident Commission* (1939) 35 Cal. App. (2d) 257, 95 Pac. (2d) 188; *Comm.* v. *Slavski* (1923) 245 Mass. 405, 140 N. E. 465.]

Once the defendant is confronted by the witnesses and does cross-examine them, the extent of cross-examination, at least as to credibility and other collateral matters, rests

within the discretion of the trial court. [See *Alford* v. *United States* (1931) 282 U. S. 687, 694; *Blitz* v. *United States* (1894) 153 U. S. 308, 312; *Storm* v. *United States* (1876) 94 U. S. 76, 85.]

It may be true that, in certain instances, where the defense seeks to examine into an important issue and "The trial court cut[s] off *in limine* all inquiry on" the subject, the curtailment may be deemed equivalent to denial of the right of cross-examination itself. [See *Alford* v. *United States, supra,* 282 U. S. 687, 693-694; see, also, *Heard* v. *United States* (C. C. A. 8th Cir. 1919) 255 Fed. 829, 832.] An asserted denial of due process, this Court wrote in *Betts* v. *Brady, supra,* 316 U. S. 455, 462,

> "is to be tested by an appraisal of the totality of facts in a given case."

So tested, the petitioner's position is revealed as utterly untenable. Numerous factors—that the transcripts sought were for use in cross-examining upon the collateral question of credibility; that the witnesses had already admitted, and the People conceded, that they had previously lied in the respect claimed; that the petitioner's attorney did cross-examine the witnesses at great length; that he exhaustively developed and harped upon the subject in question, both during cross-examination and summation; and that overwhelming proof of guilt came not alone from these witnesses but also from others called by the prosecution—true, in smaller part—and from the obviously fabricated testimony of the petitioner himself—all attest to the absurdity of the claim of prejudicial error and constitutional deprivation.

As a matter of fact, the precise question here raised has already been adversely decided.

> See *Boehm* v. *United States* (C. C. A. 8th Cir. 1941) 123 Fed. (2d) 791, cert. den. (1942) 315 U. S. 800.

In the *Boehm* case, the defendant was convicted of perjury as a result of giving false testimony in an investigation conducted by the Securities and Exchange Commission. As here, several prosecution witnesses called to establish the falsity of that testimony had also testified before the same body and, as they acknowledged at the tral, had there lied about a certain matter which constituted a vital issue at the trial; as here, the defendant, though he cross-examined the witnesses at length upon their prior perjury, sought transcripts of the prior testimony for the purpose of further developing the subject, and the trial court refused to compel production thereof.

The Circuit Court of Appeals, treating the general subject in the light of principles adduced by federal courts—which differ from the New York courts on this score—stated that it did not approve the trial judge's ruling and denominated it "error". [123 Fed. (2d), at pp. 807-808.] Declaring, however, that "the substantial rights of the defendant were not affected" (p. 808), it affirmed the conviction.

In urging that the error warranted a reversal, the defendant advanced the same contentions as does the petitioner herein: first, that production of transcripts containing the witnesses' prior false statements was obligatory (p. 805)

> "because it was relevant and material for the purpose of impeachment and would go directly to the weight and credibility of these witnesses" (*cf.* Petitioner Schappes' Brief, pp. 17-18);

and, second (pp. 805-806),

> "that appellant's right to the transcripts was incidental to his right to cross examination derived from the constitutional right to be confronted with the witnesses against him." (*cf.* Petitioner Schappes' Brief, pp. 18-22.)

Stating that "it is apparent from the record that justice has been done" (p. 807), and that "the substantial rights of the defendant were not affected" (p. 808), the

court brushed aside as specious the claim concerning deprivation of the rights of confrontation and cross-examination (pp. 805-806):

> "Of course there is no constitutional provision, Rule of Procedure or statute which requires the government to produce along with its witnesses in criminal prosecutions, the statements the witnesses may have made on occasions other than on the trial, * * * the witnesses to such extraneous statements of the prosecuting witnesses are not the witnesses with whom the constitution requires the accused to be confronted. On the contrary, a conviction on their testimony would violate the constitution. The trial court's refusal to compel the production of statements made by the government's witnesses before other witnesses on occasions other than on the pending trial manifestly affected no constitutional right of appellant."

III

The petition for a writ of certiorari should be denied.

Respectfully submitted,

FRANK S. HOGAN
District Attorney
New York County

STANLEY H. FULD
Assistant District Attorney

RICHARD G. DENZER
Deputy Assistant District Attorney

Of Counsel

November, 1943

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CHARLES ELMORE CROPLEY
CLERK

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OCTOBER TERM, 1943

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF GENERAL SESSIONS OF THE COUNTY OF NEW YORK

PETITIONER'S REPLY BRIEF

JOSEPH R. BRODSKY,
Attorney for Petitioner.

JOSEPH R. BRODSKY,
DAVID M. FREEDMAN,
of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1943

No. 434

MORRIS U. SCHAPPES,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF GENERAL SESSIONS OF THE COUNTY OF NEW YORK

PETITIONER'S REPLY BRIEF

POINT I

The *Boehm* case is neither controlling nor even persuasive of the issue raised in the petition.

The respondent cites the case of *Boehm* v. *United States* (C. C. A. 8th, 1941), 123 F. (2d) 791, cert. den. (1942) 315 U. S. 800, as having adversely decided the question raised in the case at bar (Resp. Br., p. 13). It rests that assertion on the declaration of the Circuit Court that

> "Of course there is no constitutional provision, Rule of Procedure or statute which requires the government to produce along with its witnesses in criminal prosecutions, the statements the witnesses may have made on occasions other than on the trial" (p. 805).

The question presented in the petition, however, is *not* whether a defendant in a criminal proceeding has a constitutional or other right to the production of statements made by witnesses on other occasions. The quoted statement of the Circuit Court in the *Boehm* case, whether correct or not, has no application. The question here presented is simply whether, under the particular facts of the case at bar, petitioner was deprived of the constitutional right of cross-examination. That he was so deprived because he was denied access to contradictory statements is simply a circumstance. The argument is not that petitioner had a constitutional right to prior statements,—the argument is that he was denied the constitutional right of cross-examination through the circumstance that contradictory statements of the witnesses were not made available to him. The Circuit Court in the *Boehm* case did not determine any such question. In so far as it treated of it at all, it was emphatic that the trial court had erred in not having required the production of the statements demanded by defendant in that case (pp. 807-09). Surely, if there was "no constitutional provision, Rule of Procedure or statute" which required the production of such statements at any time or under any circumstances, it is inconceivable why the Circuit Court criticized the trial court's ruling as an error.

A. The application for writ of certiorari in the *Boehm* case.

An examination of the petition and supporting brief in the application to this Court for a writ of certiorari (315 U. S. 800) shows conclusively that the question raised in the petition at bar was neither raised nor discussed there. No mention is made in the petition of a denial of any right guaranteed by the Sixth Amendment which would be analogous to the constitutional right which petitioner here claims was violated. The sole constitutional question raised was that of a denial of a "fair trial". Since under the

rules of this Court no question is considered which is not specifically raised (Rule 38, subd. 2, of Supreme Court Rules), and since that case arose in the Federal Court, this Court could, of course, consider the question of a fair trial in the light of the entire case and not merely of a specific error. Hence, the denial of certiorari in the *Boehm* case is in no way controlling here.

B. The factual situation in the *Boehm* case.

The argument advanced in the present petition is that *the whole testimony against petitioner* on the issue of falsity was that of witnesses who admittedly told contradictory stories at prior interrogations. It is this fact which made so essential their subjection to proper cross-examination to test the credibility of their evidence. We reiterate that theirs was the sole testimony offered by the People on the issue of falsity. Respondent tries to claim that this testimony was corroborated, but all it could cull from the record to support such claim is summed up in a single sentence (Resp. Br., p. 3). And what it alleges is not supported by the record.

The witness, Francis Williamson, referred to could not have known if Canning was a member of the Communist Party since he himself was not a member. But he does not even testify that Canning told him he was a member. None of the published statements referred to are in evidence and these were not even mentioned in the case during the presentation of the People's evidence; they were used to question the petitioner during cross-examination and were adequately explained by him. So that in fact there was no independent evidence offered by the People to support the testimony of the three witnesses in any particular.

In the *Boehm* case there apparently was substantial evidence of defendant's guilt in corroboration of the witnesses' testimony. As stated by the Circuit Court (123 F. [2d] 791, 803):

> "These practices which continued over a period of nearly 10 years were established by numerous witnesses *who were corroborated by many documentary exhibits.*" (Italics supplied.)
>
> "The evidence of these transactions was furnished *not only by the testimony of numerous witnesses, but also by voluminous bank statements, bank deposits and checks* which Keller had used in effecting the rebates." (Italics supplied.)

It is further argued in the petition at bar that, since the witnesses had been questioned at length by the legislative committee after denying membership in the Communist Party, clearly they must have told stories completely at variance with what they testified to at the trial. However, since the petitioner had no way of knowing what they had been asked at the legislative hearing, he was perforce unable to cross-examine them about that testimony so that the jury could determine which testimony was true.

In the *Boehm* case it appears that the defendant there knew the nature of the prior testimony of the witnesses and was able to cross-examine them about it without having the testimony before him (123 F. [2d] 791, 807). The Government's brief on the application for the writ of certiorari asserts (p. 11):

> "In most instances they were employees of the company and subordinates of petitioner, or attorneys who had been employed at his direction (R. 377-386, 398, 399, 488-491). Almost without exception, they stated that they had perjured themselves at the instance and request of petitioner (R. 658-659, 817, 965-968), and made a practice of advising petitioner of their perjury (R. 382-392, 568-569, 808-809, 965-968). Consequently, petitioner's claim that he was prejudiced in his cross-examination of these witnesses because he was ignorant of 'the material details of the prior conflicting testimony' (Pet. 30-31) is palpably frivolous."

It is not claimed here that petitioner was concerned with the prior testimony of the witnesses against him,—that they

testified as they did at his direction or that he had any knowledge of the subject matter of such testimony.

C. The extent of the request in the *Boehm* case.

It is stressed by the Circuit Court (123 F. [2d] 791, 807) as well as by the Government in its brief in the *Boehm* case that the petitioner there had requested *all of the testimony* of the adverse witnesses before the Government agency. The point is made that this would have embarrassed other prosecutions contemplated by the agency to which such testimony also referred.

In the present case it was made clear by the trial court and acquiesced in by petitioner's counsel that only such testimony as was material to the pending case should be made available to petitioner (see Pet. Br., p. 4-5). The question of confidentiality is therefore hardly germane in this case, in spite of its having been magnified by respondent in its brief.

The limitation referred to in the use of the prior testimony adequately disposes of the argument contained in B-3 of Point I in respondent's brief. Since the witnesses had disclosed that they had testified at private hearings of the committee and moreover had testified at public hearings as well, no possible public interest could be served by withholding the testimony they gave on the same subject matter to which they testified to at the trial. Either they testified the same way or there was a contradiction; if they testified the same way, the prior testimony was necessarily no longer secret; if they had testified differently and they were now telling the truth, surely the committee could not rely upon such prior testimony for any purpose. If, on the other hand, prior contradictory testimony was true, what public interest could possibly be served in permitting a defendant to be convicted on perjured testimony?

Respondent finds comfort in the case of *People* v. *Walsh* (1933), 262 N. Y. 140, 150, where the court said:

> "It is conceivable, however, that the court upon inspection may find matter, the publication of which would be prejudicial to the public interest. In such case the statement would be privileged."

Respondent's counsel, citing this quotation in their brief (Resp. Br., p. 10), print the latter portion in bold type, apparently to obscure the opening phrases of the quotation. For what is important and significant in the application of the quotation to the petition at bar is precisely the opening phrases. What is said in the quotation is what petitioner has argued for on this application, namely, that *"the court upon inspection"* shall determine the privileged character of the statement. In the present situation that is precisely what did not happen,—*the court did not inspect the statements; the court did not find them to be privileged.* It was the legislative committee who attempted to determine the privileged character of the testimony and refused to permit the court to examine it, and to this interference with its proper judicial function the trial court bowed.

The cases cited by respondent on the analogy of the secrecy of grand jury minutes are equally inapplicable (Resp. Br., p. 9). In the case of *Comm.* v. *Goldberg* (1912), 212 Mass. 88, 91, the court said:

> "The defendant had no right to have the minutes of the testimony taken before the grand jury, if there were such minutes, produced for their inspection, or to read them to the jury. The ruling excepted to went no further than this."

There is no intimation here of contradictory statements having been made. As a matter of fact, the headnote of the reporter supplements the suggestion in the opinion with the statement that there had been no testimony before the grand jury.

In *Comm.* v. *Gettigan* (1925), 252 Mass. 450, 464, it appears that

> "After verdict and sentence, the defendant filed a motion to inspect the testimony and records of the grand jury for the purpose of contradicting witnesses for the Commonwealth who had testified before the grand jury."

There is nothing to show that a contradiction existed. But even if it did, when the question is raised, not for purposes of cross-examination at trial but for the first time on an application for a new trial or to reopen the case, an entirely different situation is presented than in the case at bar.

POINT II

On the issue of falsity, the petitioner was completely deprived of the right to cross-examine the prosecution's witnesses concerning their prior contradictory statements.

The respondent in its brief, by dint of adroit repetition, seeks to create the impression, first, that since the witnesses admitted they had previously denied membership in the Communist Party, both the petitioner and the jury had before them the full extent of the contradictions and there was nothing to be gained by having the transcript of testimony produced, and, second, that in any event the witnesses had been exhaustively cross-examined by petitioner's counsel as to the contradictions. Of course, respondent's counsel do not explain why an exhaustive cross-examination was necessary if the extent of the contradiction was merely denial of party membership.

Thus, both of these suggestions are joined in respondent's brief in a sort of summation (p. 13):

> "Numerous factors—that the transcripts sought were for use in cross-examining upon the collateral question of credibility; that the witnesses had already admitted,

> and the People conceded, that they had previously lied in the respect claimed; that the petitioner's attorney did cross-examine the witnesses at great length; that he exhaustively developed and harped upon the subject in question, both during cross-examination and summation * * *."

It is submitted these statements are misleading and not consonant with the facts.

The significance of the admission of the witnesses that they had previously denied membership in the Communist Party is not that at some point they had lied as to that fact. They had admitted to having been questioned at length after such denial of membership. If those questions concerned the subject matter of their testimony at the trial, as there is every reason to believe it did, then they must have told conflicting stories about a great deal of the evidence. What petitioner was deprived of, therefore, was not just the written question and answer of membership,—he was deprived of all the questions and answers on matters to which they had just testified to at the trial. It is thus not true that the "witnesses had already admitted * * * that they lied in the respect claimed". They admitted only to one fact,—the key fact to be sure,—but they were spared from being required to answer whether they had lied or told the truth as to the remainder of their material testimony. How important the full statement is, and how unsatisfactory to rest merely on the casual admission of the contradiction, is discussed in *People* v. *Schainuck* (1941), 286 N. Y. 161, 164 (cited in footnote 7, p. 21, of Pet. Br.).

Nor is it true that petitioner's attorney "exhaustively developed and harped upon the subject in question * * * during cross-examination". It is significant that although the statement is oft repeated in the brief, respondent's counsel cite *not a single reference* to the record to substantiate it. The witnesses were cross-examined, but *they were not cross-examined as to their prior contradictory statements.* It was impossible to do so. First, because not having the statements and not knowing the contents, except

for the denial of membership, petitioner's attorney could not have known what contradictions existed to predicate his questions thereon. Second, to have asked questions without the statement before him against which to check the answers would have exposed petitioner to the rule of law that he would be bound by the answers, whether true or false. Third, without the statement before him, petitioner's attorney would have been prevented from pursuing such a line of inquiry (see *People* v. *Becker* [1914], 210 N. Y. 274, 297; cited in footnote 6, p. 20, of Pet. Br.).

POINT III

The petition for a writ of certiorari should be granted.

We are firmly convinced that the petitioner was convicted without "due process of law" as guaranteed to him by the Fourteenth Amendment. We believe the facts and the arguments presented in petitioner's brief and this reply brief make that evident. He surely should be granted the opportunity of arguing the question presented in the petition before this Court. It is therefore respectfully submitted that the petition herein be granted and that a writ of certiorari be issued as prayed for.

Respectfully submitted,

JOSEPH R. BRODSKY,
Attorney for Petitioner.

November 10, 1943.